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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MARIAH J. et al., Persons Coming  
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MARCELLA P. et al.,

Defendants and Appellants.

D054185

(Super. Ct. No. SJ11998A-D)

APPEALS from orders of the Superior Court of San Diego County, George W.

Clarke, Judge. Affirmed.

Marcella P. and her former husband, Darrick J., appeal orders removing their children, Mariah J., D.J. and Sierra J., from parental custody. Marcella and her current husband, Michael S., appeal an order removing their child, Victoria S., from parental custody.

Since Marcella and Darrick's divorce in 2002, they have involved the children in a contentious family court battle over custody and visitation. The lives of the children also have been affected by domestic violence between Marcella and Darrick and Marcella and Michael. In May 2008, after years of hostility and accusations in the family court and numerous referrals to Child Protective Services and calls to police, the four children were detained in out-of-home care.

Darrick contends the evidence was insufficient to support the court's assumption of jurisdiction based on his conduct. Marcella and Michael contend the evidence was insufficient to support the removal orders under Welfare and Institutions Code<sup>1</sup> section 361, subdivision (c)(1). Darrick also asserts the evidence was insufficient to support findings it would be detrimental to place Mariah, D.J. and Sierra with him or that there were no reasonable alternatives to removal from parental custody. In addition, he claims the court erroneously admitted certain evidence. We affirm the orders.

#### FACTUAL AND PROCEDURAL BACKGROUND

On May 15, 2008, the San Diego County Health and Human Services Agency (the Agency) petitioned on behalf of Mariah, D.J., Sierra, and Victoria under section 300, subdivision (b), alleging they had been exposed to a domestic violence incident between Marcella and Michael, there is a history of domestic violence between Marcella and

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code unless otherwise specified.

Michael, and Marcella has a history of violent confrontations with Darrick. The court ordered the children detained in out-of-home care.

Marcella and Darrick divorced in 2002. After the divorce they shared legal custody of Mariah, D.J. and Sierra, but the children resided primary with Marcella. In July 2007 the child abduction unit removed Mariah, D.J. and Sierra from Marcella and placed them with Darrick. In September 2007 the family court ordered them returned to Marcella because of concerns Darrick was not adequately supervising them or meeting their medical and education needs, and their physical environment was inadequate. Darrick is blind, but does not believe his blindness impedes his ability to care for the children.

Michael told the social worker there was no reason for the Agency to intervene and claimed the recent domestic violence charges were false. Marcella said the children are difficult and she believes Darrick is trying to influence them against her. She said he has never tried to meet the children's educational, medical or mental health needs, often does not have money for food, has a past drug history and cannot adequately supervise the children.

The children had behavior problems and showed anxiety, depression and withdrawal, and three-year-old Victoria showed untoward aggression. Six-year-old Sierra had been acting out sexually. The children described arguments and fights between the parents, and D.J. and Sierra offered contradictory statements about whether Marcella had physically abused them. The psychologist who evaluated the three older

children reported they each recalled domestic violence incidents between Marcella and Darrick and Marcella and Michael.

At the jurisdictional/dispositional hearing, counsel appointed for the children by the family court testified that when she visited Darrick's home during the time the children were living there, the apartment was bare, gloomy and dark. She was concerned Darrick had not enrolled the children in their special education classes, and they were often late to school and had no food or money for lunch. Darrick appeared angry and refused help from social services, saying it was Marcella's responsibility to take care of the children's health and educational needs. She said D.J. was parentified and very guarded.

D.J. testified about Marcella and Michael's arguments and described two occasions when Michael hit Marcella. D.J. called police during the second incident. He said he was sometimes asked to settle arguments between Michael and Marcella, and he felt he was in the middle. He offered contradictory testimony when asked about whether Darrick told him what to say in court. He said Marcella did not tell him what to say, but she pressured him.

Mariah described Michael and Marcella's arguments and said Michael once grabbed Marcella's neck and she (Mariah) hit him and tried to get him off Marcella. She said Marcella sometimes called her to witness fights so she could tell police about them. She remembered Marcella and Darrick fighting when she was very young. She said she felt caught in the middle.

The social worker who investigated the hotline referrals testified D.J. and Sierra told her Marcella physically abused them. She said that when she went to Darrick's home, Darrick did not notice when six-year-old Sierra and a friend locked themselves in a bedroom. This was concerning because there had been reports of the two kissing and of Sierra acting out sexually. Darrick denied the children had any behavioral problems when they were with him. The social worker concluded the children were at high risk for neglect or abuse.

The current social worker stated it would be detrimental to place the children with Darrick because of his significant conflict with Marcella, his inability to put their quarrels aside for the sake of the children and his unwillingness to accept parenting help. She said Darrick relied heavily on D.J., and D.J. felt insecure and had behavioral and emotional problems. She testified Mariah and Sierra also had low self-esteem, and their behavioral and emotional problems were likely the result of the domestic violence and family conflict. She said Marcella had not accepted responsibility for the domestic violence and was unwilling to separate from Michael. The social worker assessed the case as higher risk for domestic violence.

Darrick testified in the past Marcella had falsely accused him of hitting her. He said the last domestic violence between them was in 1997. He said the children reported domestic violence and physical discipline in Marcella and Michael's home. He acknowledged he had told D.J. about Marcella's faults, that she was trying to keep him from Darrick, and D.J. could lose Darrick forever if he did not tell the truth in court.

The psychologist who evaluated Darrick reported Darrick was defensive, complained during the evaluation and took little responsibility for the children being involved with the Agency. She noted he showed signs of narcissism and dependency and projected blame outward, but he did not appear to enjoy arguing, and he had a generalized anxiety disorder.

Marcella testified she and Michael had only one physical altercation and they tried not to argue in front of the children. She admitted physical violence with Darrick.

Marcella's domestic violence treatment instructor characterized Marcella's participation in class as intense. Marcella took notes, asked questions and appeared to be beginning to understand the effects of domestic violence on children.

Michael's therapist testified Michael denied being physically aggressive with Marcella during the incident that resulted in the children being detained. The therapist said Michael was meeting his therapy goals.

The court found the allegations of the petitions true by clear and convincing evidence. It removed custody of Mariah, D.J. and Sierra from Marcella, and Victoria from Marcella and Michael. It found placement with Darrick would be detrimental and ordered services for each parent.

## DISCUSSION

### I

Darrick contends the juvenile court lacked jurisdiction over him because he was a nonoffending parent. He maintains the petitions do not directly allege he presents a risk

to the children, and his domestic violence with Marcella was in the past. Substantial evidence supports the court's assumption of jurisdiction.

A reviewing court must uphold a juvenile court's findings and orders if they are supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1036-1037.) " 'The rule is clear that the power of the appellate courts begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact.' " (*In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1227.) "[W]e must indulge in all reasonable inferences to support the findings of the juvenile court [citation], and we must also . . . 'view the record in the light most favorable to the orders of the juvenile court.' " (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114.) The appellant bears the burden to show the evidence is insufficient to support the court's findings. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

The purpose of dependency law is to

"provide maximum safety and protection for children who are currently being . . . emotionally abused . . . [or] neglected . . . and to ensure the safety, protection, and emotional well-being of children who are at risk of that harm." (§ 300.2.)

The petitions allege substantial risk to the children. It is not required that there be a finding of fault as to each parent. (See *In re Phoenix B.* (1990) 218 Cal.App.3d 787, 792-793.)

The petitions alleged the children were at risk because of recent domestic violence between Marcella and Michael, and they referred to past domestic violence between

Marcella and Darrick. Although Marcella and Darrick no longer lived together, the conflict between them continued since their divorce and the children's statements showed they were being pulled into the turmoil and were affected by the hostility and rancor.

D.J. and Mariah said they heard Marcella and Darrick fighting over the telephone. Both Darrick and Marcella had called police in early 2008 to report problems with visitation, discipline or Mariah and D.J. leaving Marcella's home. Marcella, Mariah and D.J. stated Darrick had been interrogating the children about what went on in Marcella's home and coaching D.J. about what to say in court. There had been 33 calls to the child abuse hotline, and Marcella estimated the police had responded to calls to the home 15 to 20 times. Marcella described her relationship with Darrick as confrontational and said they could not communicate without fighting. Darrick said he could not work with Marcella and the children were suffering from abuse in her home. In March 2008, the attorney appointed to represent the children in the family court wrote in reference to the relationship between Darrick and Marcella:

" . . . the family has continued on its torturous path. . . . The tension between the parents is constant and overwhelming. . . . The volatility and extreme dysfunction of the parents' relationship cannot, apparently, be tampered down. . . . Counsel has grave concerns about the future of these children."

The attorney characterized Darrick as angry, and concluded Darrick's relationship with Marcella was volatile and he and Marcella would never set their hostility aside for the children's best interests. Also, there were concerns about Darrick's supervision of the children, his unwillingness to be involved with their education and health care, and his ability to provide adequate food.



Each of the children had been showing the effects of exposure to domestic violence. The psychologist who evaluated them stated Mariah's and D.J.'s emotional and behavioral problems were likely the result of domestic violence and family conflict. He recommended therapy and stated:

"Children who are exposed to family violence are at risk for developing emotional and behavioral problems that include defiance, verbal and physical aggression, depression, and . . . may resort to substance abuse and other risky activities to quell their emotional turmoil."

Substantial evidence supports the court's assumption of jurisdiction.

## II

Marcella and Michael contend the evidence was insufficient to support the court's orders removing custody of the children from them. They argue there were other reasonable ways to protect the children short of removing them. The orders are supported by the evidence.

Section 361, subdivision (c)(1), provides a child may not be taken from the custody of his or her parents unless the juvenile court finds by clear and convincing evidence:

"There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody."

The focus of the removal statute is to avert harm to the child. (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.) At disposition the juvenile court considers all relevant evidence that refers to the allegations of the petition, and it considers the conditions as

they existed at the time of the hearing. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) The court is required to consider the parent's past conduct as well as present circumstances. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 900.)

Substantial evidence supports the orders removing the children from the custody of Marcella and Michael. Marcella did not take responsibility for the violence and discord to which she had subjected the children, and she and Michael would not separate to lessen the risk of more violence. Past voluntary services designed to address domestic violence and parenting issues had been unsuccessful. The ongoing hostility between Marcella and Darrick and the domestic violence between Marcella and Michael was taking a toll on the emotional well-being of each of the children. The social worker testified D.J. felt insecure and had behavioral and emotional problems, and Mariah and Sierra also had low self-esteem and their behavioral and emotional problems were likely the result of the domestic violence and family conflict. Mariah and D.J. both said they felt caught in the middle. Three-year-old Victoria displayed untoward aggression. Substantial evidence supports the orders removing the children and supports findings there were no reasonable means to protect them short of removing them from parental custody.

### III

Darrick contends the court erred by not making the findings required by section 361, subdivision (c), to remove Mariah, D.J. and Sierra from his care, and under either section 361, subdivision (c), or section 361.2, subdivision (a), the evidence was insufficient to support a finding it would be detrimental to place them in his care.

Because the family court had granted primary physical custody to Marcella, Darrick was not the custodial parent and section 361, subdivision (c)(1), did not apply to him. Section 361.2, subdivision (a), provides that when a parent with whom the child is not residing asks for placement at disposition, the court shall place the child in that parent's care unless there is a showing by the standard of clear and convincing evidence that such placement would be detrimental to the child. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829.) Clear and convincing evidence supports a finding it would be detrimental to place the children with Darrick. He had engaged with Marcella in a determined, contentious battle over their custody, subjecting the children to ongoing emotional harm. Also, he and Marcella had a history of domestic violence. Past services had not lessened the violence and animosity the children had lived with for many years. Substantial evidence supports findings it would be detrimental to place the children with Darrick and there were no reasonable alternatives to their removal from parental custody.

#### IV

Darrick finally claims the court erred by receiving into evidence audio recordings of telephone contacts between him and the children. He argues public policy prohibits admission of the recordings, and the court erred by allowing the social worker to authenticate them because she was not present when the conversations occurred.

Evidence Code section 353 provides that if an appellant claims evidence was admitted in error, to prevail on appeal he or she must show not only that the evidence was admitted in error, but also that he or she was prejudiced by the introduction of the evidence. (*In re Crystal J.* (1990) 218 Cal.App.3d 596, 601.) Substantial evidence was

presented to show it would be detrimental to place the children with Darrick. Evidence he was inappropriately pressuring them in their testimony was not necessary for this finding. He has not shown admission of the evidence was prejudicial to his cause.

Also, the social worker was familiar with Darrick's and the children's voices and Darrick testified about the conversations he had with Mariah and D.J. He has not shown an abuse of discretion.

#### DISPOSITION

The orders are affirmed.

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McDONALD, Acting P. J.

WE CONCUR:

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AARON, J.

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IRION, J.